

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1978

\_\_\_\_\_  
NO. 78-752  
\_\_\_\_\_

T. L. BAKER,

Petitioner

V.

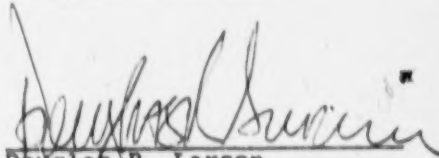
LINNIE CARL MCCOLLAN,

Respondent

\_\_\_\_\_  
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 53, paragraph 1, of the Rules of this Court, motion is hereby made that respondent be allowed to proceed in forma pauperis. Respondent's affidavit is attached to this motion.

Motion is also hereby made, on the basis of the annexed affidavit of Linnie Carl McCollan, respondent in this case, for leave to dispense with the printing of the brief in opposition to the application for certiorari.

  
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Suite 1002, Texas Building  
810 Main Street  
Dallas, Texas 75202  
(214) 742-3847  
(214) 741-2958

Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing motion was served upon the petitioner by placing a copy of the same in the United States mail, first class, postage prepaid and properly addressed, this 5th day of December, 1978, to the following:

A. W. SoRelle, III, Attorney at Law  
P. O. Box 9158  
Amarillo, Texas 79105

  
Douglas R. Larson

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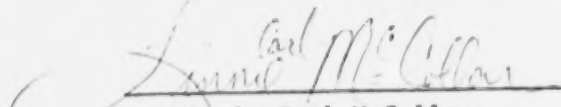
AFFIDAVIT IN SUPPORT OF MOTION  
TO PROCEED IN FORMA PAUPERIS

STATE OF TEXAS     )  
                              )  
COUNTY OF DALLAS    )

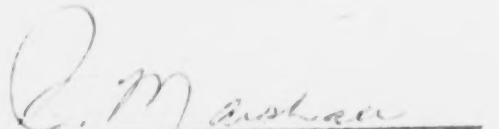
I, LINNIE CARL McCOLLAN, being first duly sworn according to law, depose and say that I am the respondent in the above-entitled cause, and, in support of my application for leave to proceed without being required to prepay costs or fees, state:

1. Because of my poverty I am unable to pay the costs of said cause.
2. I am unable to give security for the same.
3. I believe that I am entitled to the redress I seek in said cause.
4. I was granted leave to proceed in forma pauperis in the Fifth Circuit. I seek to have the Court

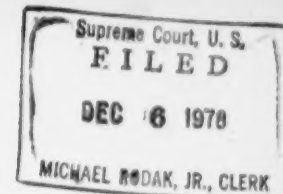
deny the petitioner's application for certiorari and I cannot proceed and be properly represented unless I am not required to pay the costs or give security therefor.

  
Linnie Carl McCollan

SUBSCRIBED AND SWORN TO BEFORE ME, by the said LINNIE CARL McCOLLAN, this 5th day of December, 1978, to certify which witness my hand and seal of office.

  
J. Marshall  
NOTARY PUBLIC in and for DALLAS  
COUNTY and THE STATE OF TEXAS

My commission expires December 31, 1980.



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BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR  
A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR  
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UNITED STATES COURT OF APPEALS  
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The respondent, Linnie Carl McCollan, plaintiff in the trial court requests the Court to deny the petitioner's application for a writ of certiorari and hereby submits this brief in opposition to said application.

MEMORANDUM FOR RESPONDENT

Respondent adopts, for purposes of this memorandum, the material in the petitioner's petition under the headings, "Opinion Below," "Jurisdiction," "Questions Presented," and "Constitutional and Statutory Provisions Involved."

STATEMENT OF THE CASE

Respondent adopts the petitioner's statement of the case, but because petitioner's statement of the case does not completely state the facts for a proper determination of this application for a writ of certiorari, respondent hereby submits the following additions:

Sometime in 1972 unknown to the respondent, Linnie Carl McCollan, his brother, Leonard McCollan, procured a duplicate of the respondent's Texas Driver's License containing Leonard's picture but respondent's name and date of birth. Throughout 1972 Leonard McCollan lived in Amarillo (Potter County, Texas) and throughout 1972 and 1973 the respondent, Linnie Carl McCollan lived in Dallas, Dallas County, Texas. After the procurement by Leonard McCollan of the forged fictitious driver's license, Leonard McCollan used this license as his own in Potter County. (SOF 147 - 148). On or about October 6, 1972, Leonard McCollan was arrested in Potter County for sale of narcotic drugs and placed in the Potter County Jail. (T 38-39; Plf. Exh. #1). At the time of this arrest the Potter County Sheriff's Office determined that they had photographs and fingerprints of Leonard McCollan that had been procured by the Potter County Sheriff on another arrest of Leonard McCollan on September 11, 1972. (SOF p. 38-41; Plf. Exh. #2, 3, and 4). The Potter County Sheriff's Office booked Leonard McCollan into the Potter County Jail as Linnie Carl McCollan and further, since Leonard McCollan had appropriated the respondent's name, the warrant that was the authority for placing him in jail was also



in the name of Linnie Carl McCollan.

Also, on October 6, 1972, a Potter County Sheriff's Deputy determined that the driver's license referred to above was altered; i.e., the Sheriff's Deputy determined that the picture on the altered driver's license was not the man whose name and date of birth appeared on the driver's license. Therefore, the Sheriff's Deputy took possession of the driver's license for evidence and for identification purposes (SOF 45-46; 116-118, Plf. Exh. 5).

Shortly after Leonard McCollan was arrested he arranged for a professional bondsman to post his bail and he was released. On November 3, 1972, this bondsman sought and received an order allowing him to surrender his principal and a warrant was issued for the arrest of Leonard McCollan. It must be remembered, however, that the warrant issued pursuant to this request was in the name of the respondent, Linnie McCollan because Leonard McCollan was using his brother's name.

On December 26, 1972, the respondent, Linnie Carl McCollan was in the City of Dallas driving for a mail messenger service and was stopped by a City of Dallas Police Officer and issued a traffic citation for running a red light. In the process of issuing this ticket the Dallas Police Officer learned of the arrest warrant in the name of Linnie McCollan in Amarillo (Potter County, Texas) and caused the respondent to be arrested and placed in the City of Dallas Jail. The Dallas Police Officer called petitioner Baker's office and notified them of the arrest of Linnie McCollan (SOF 138-146). On December 30,

1972, deputies from petitioner Baker's office arrived in Dallas and took custody of the respondent and drove him to Amarillo and then placed the respondent in the Potter County Jail. On January 2, 1973, in the late afternoon, the respondent was released from custody because it was belatedly determined that the respondent was not the man that the Potter County authorities actually wanted. (SOF 141; 145; 152).

The release of the respondent took place because the respondent had insisted that he was not the man Potter County wanted and the Sheriff and his deputies finally, after several day's delay, checked the wanted man's photo and finger prints in their files and readily determined that respondent was not the man they wanted.

At trial, petitioner Baker testified as follows (SOF 68-69):

BY MR. LARSON:

Q Shortly after this incident occurred you made a determination of the standard kind of operating procedure in counties the size of Potter County do in regards to when someone is arrested outside the county; isn't that true?

A Yes.

Q So the procedure you found out was that mug shots and fingerprints would be mailed down as soon as the notice of a warrant -- notice of arrest to someone wanted under a warrant; isn't that the standard procedure?

A. It would either be mailed or taken down.

Q. Yes. Well, did any of your deputies mail anything down to Dallas to the Dallas Police Department?

A. No, sir.

Q Did either of your deputies take mug shots or were the fingerprints with them when they came down to Dallas to pick him up?

A No, sir. Not to my knowledge.

Sheriff Baker also testified that it was the procedure of his office to photograph and fingerprint prisoners upon their arrest (SOF 31-33) and that a file is kept in his office on each person arrested and in this file folder are kept photographs and fingerprints of each prisoner. Sheriff Baker testified that his office had such a file folder with Leonard McCollan's picture and fingerprints contained therein. (SOF 108-110). Linnie McCollan and Leonard McCollan do not resemble each other in appearance.

At trial, Sheriff Baker testified thusly (SOF 110-111):

Q It's not important for you in your county to find out if you have got the right person or not?

A Yes, that's the reason that it would be necessary for you to take the time and go through the process to make sure who you were talking to in jail if there was some doubt.

Q Sheriff, it took you four days to figure out you had the wrong man?

A There was four days elapsed, there, yes.

Q It would have been a simple thing to just open up the file and look at the picture and you would have known instantaneously that you had the wrong person, right?

A No, the picture alone wouldn't have done it.

Q Why not?

A You need to go through all of your file and you need to know who you were talking to, who you had in jail.

Q Well, now, you're not telling the jury that Plaintiff's Exhibit Three looks like the man sitting over here, are you?

A No.

Q Well, what is it? I don't understand it. What is it that would have been so hard for you to have pulled out that photograph and looked at this man and said it wasn't the same person?

A Okay. What we had to do or would have had to have done would be to pull the folder out and make sure by fingerprints and everything that we had the correct picture in the file.

Q Well, you had fingerprints, too, didn't you?

A Yes, so it would be necessary for us to have, you know, both of them.

Q Well, if you had pulled the file out and found the picture in there, you would have been kind of worried, you would have done some further checking immediately, isn't that right?

A Yes, sir.

Q But nobody did that in your jail, isn't that right, until four days later?

A That's right.

#### ARGUMENT

This case does not present the issues that are represented by the questions that petitioner presents for this Court to review. The Sheriff had no right or authority to imprison anyone except the person wanted in the warrant. The circuit court correctly held that the Sheriff could not imprison under the warrant in this case anyone except the man who was actually wanted. See Wolf v. Perryman, 17 SW 772 (Tex. S. Ct. 1891); Whirl v. Kern, 407 F2d 781 (5th Cir. 1968) cert. denied, 396 U.S. 901, 90 S. Ct. 210, 24 L.Ed 2d 197 (1969). The Sheriff had to look no

further than his own files to find the necessary materials to properly ascertain the identity of the wanted man. The Sheriff violated his duty as Sheriff in that he was only authorized to imprison the wanted man and the Sheriff, by the evidence, exhibited indifference to the respondent in failing to ascertain that the respondent was not the wanted man. A man's liberty is too precious to leave without redress a man imprisoned under the facts of this case. The petitioner's reliance upon Atkins v. Lanning, 556 F.2d 485 (10th Cir. 1977) as a case from another circuit in conflict with the one at bar is misplaced. The Atkins case is distinguishable upon the law and facts. The claim against the arresting officer in the Atkins case was abandoned and further the arresting officer had no knowledge of the actual identity of Atkins as did the Sheriff in the case at bar. The Atkins case is really one involving prosecutorial immunity and not one concerned with the issues as the one at bar. Further, respondent believes that the reliance on Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L.Ed. 2d 405 (1976) is also misplaced in that the Paul case stands for the proposition that police departments may identify potential thieves without fear of Section 1983 claims.

Reliance by petitioner upon Pierson v. Ray, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1957); Scheuer v. Rhodes, 416 U.S. 232, 94 S. Ct. 1683, 40 L.Ed. 2d 90 (1974) and Woods v. Strickland, 430 U.S. 308, 95 S. Ct. 992, 43 L.Ed 44 (1975) is also misplaced because in each of these cases the immunity granted to the defendant is one involving discretionary acts.

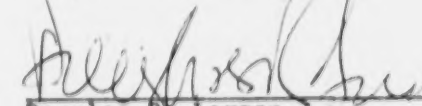
The act of imprisoning the respondent required no immediate decision. The respondent does not claim a § 1983 claim arose immediately upon his arrest, but when the Sheriff should have discovered that he caused imprisonment of the wrong man. See Whirl v. Kern, supra. The Sheriff was not under any immediate pressure to make a decision, but merely look at his own files and act according to common sense. Had the Sheriff performed his duty, the respondent would have no case.

The Supreme Court has been recently asked on two occasions to review the acts of sheriffs in false imprisonment cases from the Fifth Circuit. Both of these cases involve conflicts between sheriffs and their prisoners, and each time this Court has declined. See Whirl v. Kern, supra, and Bryan v. Jones, 530 F.2d 1210 (5th Cir. - En banc) Cert. denied 429 865, 97 S. Ct. 174, 50 L.Ed. 2d 405 (1976). The case at bar presents issues much less important than Whirl and Bryan.

#### CONCLUSION

For the above reasons, it is respectfully submitted that the petitioner's application for a writ of certiorari be denied.

Respectfully submitted,

  
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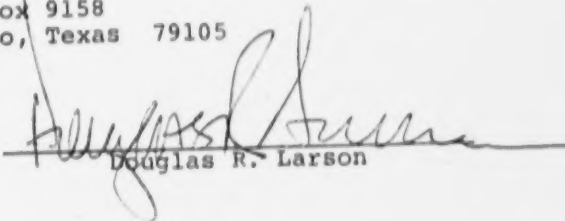
Attorney for Respondent



CERTIFICATE OF SERVICE

I certify that a true and correct of the  
above and foregoing Brief was served upon the petitioner  
by placing a copy of the same in the United States mail,  
first class, postage prepaid and properly addressed,  
this 5th day of December, 1978, to the following:

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